NOTE

KREIMER v. BUREAU OF POLICE FOR MORRISTOWN: THE STERILIZATION OF THE LOCAL LIBRARY

Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992).

The Mission Statement for the Joint Free Public Library of Morristown and Morris Township states that its purpose, in part, is "[to provide the residents] of Morristown and Morris Township with current reading materials, programs and materials for continuing education, self-improvement, enjoyment and information."[1] However, the current library patron policy may deny access to patrons who are not reading, studying, using library materials, or whose bodily hygiene is offensive.[2] Because of the nature of these restrictions, the policy excludes many for whom access to the information and self-

---

1. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, MISSION STATEMENT (1992) (copy on file with the *Stetson Law Review*). This statement echoes the sentiments of other public libraries. For example, the Mission Statement of the San Bernardino Public Library includes the following:

> It is vitally important that every citizen in our community have ready and free access to the world of ideas, information, and creative experience. To this end, San Bernardino Public Library's mission is to provide for the public convenient access to information, library materials, life-long learning opportunities, cultural events, and appropriate new technologies, and to promote our services to make them known to the community.

SAN BERNARDINO PUB. LIBR., MISSION STATEMENT (1991) (*quoted in* 137 CONG. REC. E3767 (daily ed. Nov. 8, 1991) (statement of Rep. Lewis)).

2. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶¶ 1, 5, 9 (July 1989) (copy on file with the *Stetson Law Review*). For the text of the contested paragraphs of the policy, see *infra* text accompanying note 23. The library still follows this policy. Some of the wording has been changed and the paragraphs have been renumbered. However, for consistency with the court's decision, this Note will address the paragraphs as numbered by the court.

improvement materials are essential. That group is the homeless population.

An estimated 730,000 people in America are homeless on any given night.[3] Every year, between 1.3 million and 2 million people are homeless at some time.[4] Without sufficient money to find a place to sleep or eat, the homeless generally cannot afford to buy the daily newspaper or the latest news magazine. They have limited access to television on which to see the national or local news. Instead, the homeless may visit their local public library to catch up on the day's events. They may also use the library to learn about benefits to which they may be entitled or to obtain information which may assist them in overcoming poverty. Yet, in *Kreimer v. Bureau of Police for Morristown*,[5] the United States Court of Appeals for the Third Circuit upheld the validity of the patron policy enacted by the Joint Free Public Library of Morristown and Morris Township, New Jersey, to limit access to the library. The policy defined appropriate conduct for use of the library and required patrons whose "bodily hygiene is offensive so as to constitute a nuisance to other persons" to leave the building.[6] Because many homeless people do not have regular access to a shower or laundry facilities to improve their hygiene, the *Kreimer* decision may deny these citizens access to public libraries and their materials.[7] In addition, this library policy may

---

3. *The "Homeownership and Opportunity for People Everywhere" [HOPE], Initiatives: Hearings on Housing Legislation Before the Senate Committee on Banking*, 101st Cong., 2d Sess. 6 (1990) (statement of Sen. Donald Riegle, Chairman). *See also* H.R. REP. NO. 366, 102d Cong., 1st Sess. 2 (1991) (stating that "[n]ational estimates of the homeless range from a quarter of a million to 3 million people"). The Census calculated 222,621 homeless persons in the U.S. during one night in March 1990. *Id*. However, advocacy groups have sued the Census Bureau claiming the homeless population is between 700,000 and 3 million. *A Plan for Homeless Due in 9 Months*, ORLANDO SENTINEL, May 20, 1993, at A16. Of the homeless population, the U.S. Department of Housing and Urban Development believes one third of the homeless are mentally ill. Mary McGrory, *Instead of Treatment, Retreat*, WASH. POST, Apr. 20, 1993, at A2. Advocates suggest that an additional one third are on drugs or alcohol, and the remaining one third are down on their luck. *Id*.

4. The National Alliance to End Homelessness estimated this number. *See* H.R. REP. NO. 366, 102d Cong., 1st Sess., at 2 (1991).

5. 958 F.2d 1242 (3d Cir. 1992).

6. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 9 (1989). Other sections require, in part, that patrons leave the building if not engaged in reading, studying, or using library materials and that patrons avoid staring at another person with the intent to annoy that person. *See infra* text accompanying note 23.

7. *See supra* note 1 and accompanying text.

prevent the homeless from finding the necessary resources to escape their poverty.

While the *Kreimer* decision is binding only as to the Morristown Library's policy, the decision impacts libraries across the country. The court clearly stated that a public library is a designated public forum.[8] This classification requires all public libraries to carefully consider any restrictions imposed on speech.[9] The decision is also significant because homelessness is a national concern.[10]

This Note recounts the facts of the *Kreimer* case. It also discusses three of the doctrines used by the Third Circuit Court of Appeals in reaching its decision that the policy was acceptable: 1) time, place, and manner restrictions; 2) the void for vagueness doctrine; and 3) the overbreadth doctrine. The Note suggests that the court acted correctly in upholding sections of the questioned policy which forbid specific activities. However, the Note criticizes some of the court's conclusions, in particular, its support for the prohibition on offensive bodily hygiene. The Note also explains how the court misapplied some of these doctrines in preserving the patron policy, as written. Finally, the Note recommends that public libraries, such as the Morristown Library, adopt a patron policy that addresses their concerns about annoying and nuisance behavior without excluding the homeless population.

I. THE FACTS[11]

Richard Kreimer is a homeless man who resides at various out-

8. See *infra* notes 47-62 and accompanying text for a discussion of the court's reasoning in reaching this decision.

9. Attorney Bruce Ennis, who represents the Freedom to Read Foundation, advised librarians to "make their best guess" each day on the application of library rules. Gordon Flagg et al., *Not the Big One II: 1992 ALA Conference*, 23 AM. LIBR. 628, 631 (1992). Ennis, speaking to the Public Library Association about the impact of the *Kreimer* holding, was concerned about various courts' application of the standards governing public forums. *Id*. *See also infra* note 163.

10. *See supra* notes 3-4 and accompanying text.

11. The facts are taken from the opinions of both the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit, as well as from the briefs submitted in this case.

door public sites in Morristown, New Jersey.[12] He frequently visited the Morristown Library to read or simply to sit in silent contemplation.[13] However, library personnel viewed Kreimer's conduct differently. They claimed that he exhibited disruptive behavior and that his body odor was so offensive that it prevented the use of certain areas of the library.[14]

The librarians began keeping a log of problem behavior in the library.[15] In May 1989, the Library Board of Trustees enacted the Library Patron Policy to address the concerns raised by the behavior.[16] The policy covered a wide range of activities. In addition to requiring patrons to engage in activities associated with the use of a public library, such as reading or seeking information, the policy prohibited loitering, food and beverages, and noisy and boisterous activities.[17] It also allowed library staff to ask someone to leave if their bodily hygiene did not "conform to the standard of community public places."[18] Under the new policy, Kreimer was twice asked to leave because of concerns about his bodily hygiene and his use of the library.[19]

Based on the library's actions, Kreimer consulted with members of the American Civil Liberties Union of New Jersey (ACLU-NJ), who informed the library that sections of the policy were potentially

---

12. Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242, 1246 (3d Cir. 1992). Despite receiving more than $200,000 in settlements from two lawsuits, Kreimer still lives on the streets. Paula Span, *Morristown's Man on the Street: He Sued the Town. It Paid Him a Bundle. So Why is Richard Kreimer Still Homeless?*, WASH. POST, Oct. 14, 1992, at C1.

13. 958 F.2d at 1246-47.

14. *Id*. The library personnel complained that Kreimer often stared at or followed patrons and talked loudly to himself. *Id*.

15. *Id*. The log book includes entries from a patron complaining about the difficulties of "negotiating the sleeping bodies," a patron who felt nervous because of people staring at her, a patron complaining about offensive odors from several men in the periodicals room, and a patron who was intimidated by two men whose smell made her nauseous. Brief on Behalf of Defendants The Joint Free Public Library of Morristown and Morris Township at 5-6, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501).

16. 958 F.2d at 1246-47. New Jersey Revised Statutes § 40:54-12 states that a library board of trustees "may . . . make proper rules and regulations for the government of the library." N.J. REV. STAT. § 40:54-12 (1991).

17. *See infra* text accompanying note 23.

18. Kreimer v. Bureau of Police for Morristown, 765 F. Supp. 181, 184 (D.N.J. 1991) (quoting JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 9 (May 1989)), *rev'd*, 958 F.2d 1242 (3d Cir. 1992).

19. 958 F.2d at 1247.

unconstitutional.[20] In an effort to address the concerns raised by the ACLU-NJ, the library revised its policy.[21] The ACLU-NJ's concerns focused on the following three paragraphs of the policy.[22]

> 1. Patrons shall be engaged in ~~normal~~ activities associated with the use of a public library while in the building. Patrons not engaged in reading, study, or using the library materials *shall be required* ~~may be asked~~ to leave the building. ~~Loitering will not be tolerated~~.
>
> . . . .
>
> 5. Patrons shall respect the rights of other patrons and shall not *harass or* annoy others through noisy or boisterous activities, by ~~unnecessary~~ staring *at another with the intent to annoy that person*, by following another person ~~through~~ *about* the building *with intent to annoy that person*, by playing Walkmans or other audio equipment so that others can hear it, by singing or talking to oneself, or any other behavior which may reasonably result in the disturbance of other persons.
>
> . . . .
>
> 9. ~~Patron dress and personal hygiene shall conform to the standard of community public places. This shall include the repair or cleanliness of garments~~. *Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building*.
>
> Any patron not abiding by these or other rules and regulations of the library *shall* ~~may~~ be asked to leave the library premises. Library employees shall contact the Morristown Police if deemed advisable.
>
> Any patron who violates the library rules and regulations may be denied the privilege of access to the library by the library Board of Trustees, on recommendation of the Library Director. *Any aggrieved patron may have the decision reviewed by the Board of Trustees but only if the patron has complied with the directive of the Library Director.*[23]

---

20. *Id*. at 1248.

21. *Id*.

22. *Id*. Words and phrases added after the ACLU-NJ first raised its objections are italicized. Words and phrases which were omitted by the library after the ACLU-NJ raised its objections are indicated by strikeouts.

23. Kreimer v. Bureau of Police for Morristown, 765 F. Supp. 181, 183-85 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992). The revised policy reflects the current Library Patron Policy of the Joint Free Public Library of Morristown and Morris Township.

Despite the changes, the ACLU-NJ still complained about the excessive discretion the policy delegated to library employees.[24] The ACLU-NJ also feared that the provision regarding bodily hygiene would result in discriminatory treatment of the homeless.[25] Meanwhile, the library continued to expel Kreimer from its premises when its employees determined he was not complying with the patron policy.[26]

In January 1990, Kreimer filed suit in the Federal District Court for New Jersey against the library, its Board of Trustees, the Morristown Bureau of Police, and assorted library and municipal officials alleging that the library's rules were vague and overbroad on their face and as applied to him by the library's staff.[27] He also alleged that the rules violated his First Amendment and due process rights.[28] Finally, his complaint alleged violations of the New Jersey Constitution.[29]

Following oral argument, the district court issued an order for summary judgment in favor of Kreimer, striking paragraphs one,

---

24. 958 F.2d at 1248.

25. *Id*.

26. *Id*. Kreimer was expelled from the library at least twice under the original set of rules. *Id*. at 1247. He was also expelled under the revised rules whenever library staff felt he was not in compliance with the rules. *Id*. at 1248. The library admitted that Kreimer was asked to leave on five occasions. Brief on Behalf of Defendants The Joint Free Public Library of Morristown and Morris Township at 5, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501). However, Kreimer asserted that he was asked to leave on 11 occasions. Brief on Behalf of Plaintiff/Appellee Richard R. Kreimer at 6, *Kreimer* (No. 91-5501).

27. 765 F. Supp. at 183.

28. *Id*.

29. *Id*. Richard Kreimer contended that the library rules violated two paragraphs of the New Jersey Constitution, specifically: N.J. CONST. art. 1, ¶ 6: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."; and N.J. CONST. art. 1, ¶ 18: "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances."

The court of appeals rejected both arguments finding that New Jersey's expanded free speech and assembly protection lies in its citizens' rights to enter private property that has been opened to the public. 958 F.2d at 1269.

For a more thorough discussion of constitutional issues specific to the New Jersey Constitution, see Brief of the Attorney General of New Jersey as Amicus Curiae at 30-34, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501) and Brief of the Public Advocate of New Jersey as Amicus Curiae at 14-23, *Kreimer* (No. 91-5501).

five, and nine of the library policy.[30] The district court held that the rules were unconstitutionally overbroad and vague and that the rules violated the First and Fourteenth Amendments to the United States Constitution.[31] The library appealed the judgment to the Court of Appeals for the Third Circuit, which reversed the district court and upheld the validity of the library policy.[32]

II. THE KREIMER *COURT'S REASONING*

The Third Circuit began its analysis by discussing the appropriate standard of review. The *Kreimer* court determined that its review of the district court's order granting summary judgment was plenary.[33] The *Kreimer* court followed the traditional test for summary judgments in its review of the order.[34] The court recognized that in most cases where an appellate court reverses a grant of summary judgment, a genuine issue of material fact will remain, thus precluding the appellate court from ruling in favor of the appellant.[35] However, in this case, the *Kreimer* court concluded that since

---

30. 765 F. Supp. 181, 198-99. *See supra* text accompanying note 23.

31. *Id*.

32. 958 F.2d at 1270-71. While the appeal was pending, Mr. Kreimer received $80,000 from the library's insurer to settle his claims for compensatory damages. Robert Hanley, *Homeless Man Will Appeal Decision on Library Rules*, N.Y. TIMES, Mar. 26, 1992, at B8. The settlement was paid over the library's objections and just three weeks before the court of appeals reversed the lower court. *Id*. He also received a $150,000 settlement from the Town of Morristown to settle a separate harassment suit against the police and town council. *Id*.

33. 958 F.2d at 1250 (citing Maguire v. Hughes Aircraft Corp., 912 F.2d 67, 69 (3d Cir. 1990); IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118, 122 (3d Cir. 1986)). The *Kreimer* court noted that the district court entered an order enjoining the library from enforcing its rules. *Id*. Because the district court did not follow the traditional balancing test required for injunctive relief when it granted summary judgment in favor of Kreimer, the appellate court followed the traditional review for summary judgments. *Id*. The *Kreimer* court explained, however, that the standard of review for both injunctions and summary judgments is the "abuse of discretion" standard, which exists when there is an "errant conclusion of law." *Id*. (citing International Union, UAW v. Mack Trucks, Inc., 820 F.2d 91, 95 (3d Cir. 1987)).

34. *Id*. (quoting Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977)). The test requires that the inferences drawn from the facts submitted to the trial court be viewed in the light most favorable to the opposing party. *Id*. In addition, the non-movant's allegations should be considered true. *Id*. Any conflict with the assertions of the movant should be resolved in favor of the non-movant. *Id*.

35. 958 F.2d at 1250 (citing First Nat'l Bank v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 281 (3d Cir. 1987)).

the appeal involved only issues of law, it could enter an order to the district court directing summary judgment in favor of the appellant.[36]

A. Receiving Information is a First Amendment Right

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[37] While considering the constitutionality of the library rules, the *Kreimer* court first addressed whether a First Amendment right actually existed in this case.[38] In order to resolve this question, the court examined a long line of United States Supreme Court cases which have concluded that freedom of speech includes the right to receive information.[39]

In particular, the *Kreimer* court focused on *Board of Education v. Pico*, which involved the removal of books from junior and senior

---

36. *Id*.

37. U.S. CONST. amend. I.

38. 958 F.2d at 1250. The court reasoned that if a First Amendment right did not exist, it was not necessary to proceed any further. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985).

39. 958 F.2d at 1250-55 (discussing Martin v. City of Struthers, 319 U.S. 141 (1943) (holding that freedom of speech encompasses the right to distribute literature and the right to receive it); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (rejecting a requirement that foreign mail must be held at the post office until the addressee returns a reply card as stifling First Amendment rights of debate and discussion); Griswold v. Connecticut, 381 U.S. 479 (1965) (plurality opinion) (striking a Connecticut law which banned the distribution of contraceptives as violative of the First Amendment by limiting the spectrum of available knowledge); Stanley v. Georgia, 394 U.S. 557 (1969) (holding that the First Amendment encompasses the right to receive information, regardless of its social worth); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969) (stating that the public has a right to receive "suitable access to social, political, esthetic, moral and other ideas and experiences"); Kleindienst v. Mandel, 408 U.S. 753 (1972) (finding that the First Amendment includes the right to receive information and ideas); and First Nat'l Bank of Boston v. Belloti, 465 U.S. 765 (1978) (holding that the First Amendment encompasses access to the dissemination of ideas)).

high schools.[40] The *Kreimer* court examined the *Pico* plurality's view that the "`special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students,' for the library is a place for voluntary inquiry and study."[41] The court also recognized that the dissenters in *Pico* were concerned with the Court's intrusion into a school board function.[42] However, the *Kreimer* court noted that even the four dissenting Justices did not dispute the notion that the First Amendment encompasses the right to receive information and ideas.[43]

Based on its review of *Pico* and other Supreme Court precedent, the *Kreimer* court concluded that the First Amendment not only bars government censorship of information, but also "encompasses the positive right of public access to information and ideas."[44] The *Kreimer* court further declared that the First Amendment "includes the right to some level of access to a public library, the quintessen-

---

40. 958 F.2d at 1253 (citing Board of Educ. v. Pico, 457 U.S. 853 (1982) (plurality opinion)). The *Pico* case involved an order by the Board of Education of Island Union Free School District No. 26 in New York State to remove certain books deemed anti-Christian or anti-Semitic from junior and senior high schools. Students in the district brought suit alleging an infringement of their First Amendment rights to receive information. *Pico*, 457 U.S. at 859. A plurality of the U.S. Supreme Court affirmed the decision of the Court of Appeals for the Second Circuit ordering a trial on whether the school board exceeded its limitations by removing the books. *Id*. at 875.

> The plurality of the Court recognized that the right to receive information:
> is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment rights to send them . . . .
>
> More importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.

Id. at 867.

41. 958 F.2d at 1254 (quoting *Pico*, 457 U.S. at 868).

42. *Id*. Justices Burger, Powell, Rehnquist, and O'Connor all expressed concern over the role of the court system in determining educational policy for a school system. Each suggested that policy is more appropriately decided by the local school system. 457 U.S. at 885-921.

43. 958 F.2d at 1254-55. The *Kreimer* court quoted from Justice Rehnquist's dissenting opinion, which declared that "[t]he libraries of [elementary and secondary] schools serve as supplements to this inculcative role. Unlike universities or *public libraries*, elementary and secondary schools are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas." 457 U.S. at 915 (Rehnquist, J., dissenting) (emphasis added).

44. 958 F.2d at 1255.

tial locus of the receipt of information."[45] According to the *Kreimer* court, the next step required identification of the nature of the forum in order to determine the extent to which government may limit access to the information.[46]

B. The Three-Part Forum Analysis

The *Kreimer* court's analysis of the library policy turned, in part, on whether the court classified the library as a public or nonpublic forum.[47] As the court explained, the United States Supreme Court first adopted a three-part forum analysis in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.[48] The forums include the traditional public forum,[49] the designated public forum,[50] and the non-

---

45. *Id*.

46. *Id*. (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 797 (1985)).

47. *Id*.

48. 460 U.S. 37 (1982). In *Perry*, the Court faced a challenge to a board of education policy which permitted only the current union representative to use teacher mailboxes to disseminate information. *Id*. at 40. A second union vying for representation rights sought equal access to the mailboxes. *Id*. at 41. In selecting the appropriate scrutiny to apply to the regulation, the Court devised the three-part forum analysis. *Id*. at 45-55. See *infra* notes 49-51 and accompanying text for a discussion of each of the three forums.

49. Quoting from *Hague v. Committee for Indus. Orgs.*, the *Perry* Court noted traditional public forums include places which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 460 U.S. 37, 45 (quoting *Hague*, 307 U.S. 496, 515 (1939)). In these quintessential traditional public forums, the state must demonstrate its regulations are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id*.

See also United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114 (1981) (noting that the Court has long recognized reasonable time, place, and manner restrictions on public forums as long as they serve a significant government interest and leave open alternate channels of communication); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530 (1979) (recognizing the validity of time, place, and manner restrictions serving a significant government interest and leaving ample alternative channels of communication); Grayned v. City of Rockford, 408 U.S. 104 (1972) (stating that any restriction on expressive activity in a public place must be for a weighty reason).

50. This forum encompasses those properties that the state opens for public use for expressive activity, even though there is no specific requirement to create the forum. In determining whether a designated public forum is created, the Court emphasized the necessity of considering the intent of the government in opening the forum. *Perry*, 460 U.S. at 46.

See also Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a university created an open forum by allowing students to use its facilities and requiring it to demon-

public forum.[51]

C. The Library is a Limited Public Forum

In determining where a public library fits within this spectrum of categories, the *Kreimer* court rejected the lower court's view that a library is a quintessential public forum, stating:

> It is clear to us that a public library, albeit the "quintessential" locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum. Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in other conduct that would disrupt the quiet and peaceful library environment.[52]

Instead, the court identified the library as a limited public forum, a subset of the category of designated public forum.[53] In reaching this conclusion, the court looked to the government's intent in opening the library and focused on the New Jersey statute which requires the establishment of a library to be approved by the majority of voters in the municipality.[54] The court also noted that the intent to

---

strate a compelling governmental interest in restricting that use); Madison Sch. Dist. v. Wisconsin Employment Relations Comm'rs, 429 U.S. 167 (1976) (ruling that the state opened a school board meeting to the public and, thus, cannot discriminate between speakers based on employment or content of their speech); and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (finding that a municipal theater is a public forum and that a city cannot exclude a production without constitutional safeguards).

When the government retains the open character of a facility and permits expressive activity, the designated public forum analysis requires that regulations be studied to assure that they are narrowly tailored to serve a significant governmental interest and provide ample alternative means of communication. *Perry*, 460 U.S. at 46.

51. Non-public forums are those which are "not by tradition or designation a forum for public communication." 460 U.S. at 46. In these forums, the state may enact time, place, and manner restrictions and may impose regulations as long as they are reasonable and are not designed to suppress expression merely because the public officials oppose the speaker's view. *Id*.

In *Perry*, the Court determined that teacher mailboxes fell within this third category. The Court decided that the standard regulating their use was reasonable as long as alternate means of communication were available to the union. *Id*.

52. 958 F.2d at 1256.

53. *Id*. at 1259.

54. *Id*. New Jersey Revised Statutes § 40:54-2 states: "No such library shall be established in any municipality unless assented to by a majority of the legal voters of

open the library only for specific purposes is included in the preamble to the challenged policy, which states that its objective is to "allow all patrons of the Joint Free Public Library of Morristown and Morris Township to use its facilities to the maximum extent possible during its regularly scheduled hours."[55]

In the next step of its analysis, the *Kreimer* court examined whether the library retained any discretion regarding who could use the facility.[56] Finding a lack of information in the record, the court decided that the library retained authority to exclude patrons violating its rules.[57] In addition, by specifically stating that the library was for reading, studying, and using library materials, the court determined that the library did not open its door for the exercise of all First Amendment activities.[58] The final step in the *Kreimer* court's forum analysis included a comparison of the nature of the property with the property's customary usage.[59] The court concluded that traditional interactive First Amendment activities and oral speech are "antithetical to the nature of libraries."[60] Adopting the reasoning of the United States Court of Appeals for the Second Circuit in *Travis v. Owego-Apalachin School District*,[61] the *Kreimer* court supported its limit on the designated public forum class by stating that constitutional protection is available only to expressive activities which the government has already allowed in the limited forum.[62]

---

the municipality, at an election, general or special, at which the question of the adoption of this article shall be submitted to vote by direction of the governing body." N.J. REV. STAT. § 40:54-2 (1991).

55. 958 F.2d at 1259 (quoting JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY, Preamble (July 1989)).

56. 958 F.2d at 1260.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*. at 1261. The *Kreimer* court stated that the library's purpose is to "aid in the acquisition of knowledge through reading, writing and quiet contemplation." *Id*.

61. 958 F.2d at 1261 (citing Travis v. Owego-Apalachin Sch. Dist., 927 F.2d 688 (2d Cir. 1991)). In *Travis*, a local school board refused to allow a religious organization the use of a middle school auditorium despite its previous use by another religious group. *Travis*, 927 F.2d at 690.

62. 958 F.2d at 1261 (citing *Travis*, 927 F.2d at 692).

D. The Court's Application of the Standards of Review

The *Kreimer* court classified the library as a "limited public forum," a subset of a designated public forum.[63] However, the court conceded that it would reach the same conclusions from its analysis using the "designated public forum" classification.[64] In determining whether the rules in question violated any constitutional guarantees, the *Kreimer* court applied two standards of review.[65] The court applied a reasonableness test to paragraphs one and five,[66] based on a standard enunciated by a plurality of the United States Supreme Court in *United States v. Kokinda*.[67] Using the plurality's analysis,

---

63. *Id*. at 1259.

64. *Id*. at 1261 n.21. Since *Kreimer*, the U.S. Supreme Court has combined the limited and unlimited use forums into its designated public forum category. In International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992), the Court considered an airport's classifications under the three-part forum analysis. Writing for the majority, Chief Justice Rehnquist described a designated public forum as "whether of a limited or unlimited character — property that the state has opened for expressive activity by part or all of the public." *Id*. at 2705. Further, the Court stated that a designated public forum is subject to the same scrutiny as a traditional public forum, thus requiring regulations to be narrowly drawn to achieve a compelling governmental interest. *Id*. In *Lee*, the Supreme Court held that an airport was a non-public forum, thus any regulations restricting First Amendment rights need only pass a reasonableness analysis. *Id*.

65. 958 F.2d at 1262-65.

66. Paragraph one requires patrons to read, study, or use library materials while in the building. Paragraph five requires patrons to respect the rights of others by refraining from harassing and annoying activities. *See supra* text accompanying note 23.

67. 497 U.S. 720 (1990) (plurality opinion). Four Justices concurred in Justice O'Connor's opinion, Justice Kennedy concurred only in the result, and four Justices dissented. In *Kokinda*, the Postal Service blocked a political advocacy group from using the sidewalk in front of the post office to solicit contributions and distribute literature. *Id*. at 723-24. A plurality of the Court decided that the sidewalk was a non-public forum since the government did not intentionally open the sidewalk for First Amendment activity. *Id*. at 727. The only expressive activity allowed was the posting of notices on designated bulletin boards. *Id*. at 730. Acknowledging that the bulletin boards might remove the post office from the pure non-public forum designation, the plurality determined that "the reserved non-public uses would still require application of the reasonableness test." *Id*. at 731.

> In his dissent, Justice Brennan sharply criticized this approach:
>
> Because the plurality finds that the prohibition on solicitation is part of the definition of the forum, it does not view the regulation as operating on a public forum and hence subjects the postal regulation to only a "reasonableness" inquiry. If, however, the ban on solicitation were found to be an independent restriction on speech occurring in a limited public forum, it would be judged to stricter scrutiny.

the *Kreimer* court found that the restrictions on library usage and conduct contained within paragraphs one and five were reasonable and valid.[68] However, in analyzing paragraph nine, which regulated offensive bodily hygiene,[69] the court applied a stricter standard of review.[70] Reasoning that this paragraph applied to patrons who might otherwise be using the library in accordance with its stated purpose, the court determined the rule should be "narrowly tailored to serve a significant governmental interest and must . . . leave ample alternative channels of communication."[71] Using the definition of "narrowly tailored" recently discussed by the Supreme Court,[72] the court found the rule sufficiently narrow because it furthers the library's goal of preventing interference with other patrons' enjoyment of the library while maintaining its facilities in a sanitary manner.[73] The court also stated that any patron who is asked to leave because of poor bodily hygiene is not completely barred from access to library materials.[74] As long as the patron complies with the rules, the patron can reenter and use the library.[75] While acknowledging that the rule may disproportionately affect the homeless, the court believed that insufficient justification existed for allowing one patron with offensive bodily hygiene to force other patrons to leave the library.[76]

Id. at 750-51 (Brennan, J., dissenting).

68. 958 F.2d at 1262-63 (following United States v. Kokinda, 497 U.S. 720 (1990)). The Supreme Court of Rhode Island, citing *Kreimer*, used a similar analysis in *In re* Cross, 617 A.2d 97 (R.I. 1992). The court rejected a bail bondsman's argument that disciplinary action for his disruptive behavior at the courthouse violated his right to free speech. *Cross*, 617 A.2d at 103-04. Instead, the court stated the courthouse is a limited public forum. *Id*. at 104. Therefore, activities which go beyond the administration of justice in a controlled setting may be regulated. *Id*.

69. *See supra* text accompanying note 23.

70. 958 F.2d at 1264.

71. *Id*. at 1265.

72. *Id*. at 1264 (quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989)). In *Ward*, the Supreme Court upheld New York City's plan to regulate sound levels at Central Park concerts by providing its own sound system and technicians. *Ward*, 491 U.S. at 803. In response to a challenge to the city's plan by a concert promoter, the Court determined that "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." 491 U.S. at 800.

73. 958 F.2d at 1265.

74. *Id*.

75. *Id*.

76. *Id*. Interestingly, in an amicus brief filed with the appellate court, the New Jersey Attorney General claimed that the trial court's finding that the prohibition of

E. The Rules are not Vague

The *Kreimer* court also rejected Kreimer's arguments that the rules violated the "void for vagueness" doctrine.[77] The court cited *Grayned v. City of Rockford*,[78] in which the United States Supreme Court identified three values that are offended when laws are too vague. First, the law may "trap the innocent" by not clearly defining prohibited conduct.[79] Second, laws which are too vague may allow for arbitrary and discriminatory enforcement by government because officials themselves do not have identified standards to apply.[80] Third, the law may abut and chill First Amendment freedoms.[81] In applying the vagueness doctrine to both criminal and civil cases, the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[82]

Following these vagueness guidelines, the *Kreimer* court determined that the language in paragraph five,[83] regarding annoying behavior, specifically proscribed staring and following others. The court believed this language prevented any subjective determination on what is annoying.[84] In addition, the *Kreimer* court felt that the broad language in paragraph nine regarding nuisance behavior was necessary, since a complete listing of nuisance behavior would be impossible.[85] The court also stated that this language was sufficient under New Jersey common law which defines nuisance as including

---

patrons based on poor bodily hygiene created "a constitutional right to smell badly in a public library." Brief of the Attorney General of New Jersey as Amicus Curiae at 28, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501). The Third Circuit did not agree with this argument. Instead, the court decided that the paragraph addressing bodily hygiene passed muster under the narrowly tailored test. 958 F.2d at 1264.

77. *Id*. at 1266.

78. 408 U.S. 105 (1972).

79. *Id*. at 108.

80. *Id*. at 108-09.

81. *Id*. at 109. *See also* Kolender v. Lawson, 461 U.S. 352 (1983) (stating that the void-for-vagueness doctrine requires that a penal statute contain sufficient definiteness that ordinary people can understand what conduct is prohibited).

82. Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982). *See infra* note 88.

83. *See supra* text accompanying note 23.

84. 958 F.2d at 1268.

85. *Id*.

"anything that unduly interferes with the exercise of the common right."[86]

F. The Rules are not Overbroad

A regulation which affects First Amendment rights may also be rejected if it is overbroad. The *Kreimer* court recognized that an individual whose own conduct is properly prohibited may challenge a regulation as overbroad because the regulation may affect other individuals not before the court who may be reluctant to risk prosecution.[87] The *Kreimer* court then emphasized that the main concern in reviewing overbreadth challenges is whether "the enactment reaches a *substantial* amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail."[88]

Following these guidelines in its review of the questioned paragraphs in the library policy, the *Kreimer* court dismissed Kreimer's overbreadth arguments.[89] The court held that paragraphs one and five did not reach a substantial amount of constitutionally protected activity, while paragraph nine was narrowly tailored and, thus, did not restrict patrons from exercising their constitutional rights.[90]

Finally, the court rejected Kreimer's assertion that paragraph

---

86. *Id*. (citing Mayor of Alpine v. Brewster, 80 A.2d 297 (N.J. 1951)).

87. *Id*. at 1265. In Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), the Supreme Court reviewed a Washington state law which included in its definition of obscene matter that which "when considered as a whole, appeals to the prurient interest." *Brockett*, 472 U.S. at 493. Several businesses, which marketed materials to the adult public, challenged the definition in the statute for the word "prurient" as being unconstitutionally overbroad. *Id*. at 494.

The Court said it was appropriate to allow those whose own speech is banned to challenge questionable regulations because "it also threatens others not before the court — those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Id*. at 503.

88. 958 F.2d at 1265 (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) (emphasis added)). In *Hoffman*, a business contested a local ordinance which banned the sale of items designed for use with illegal drugs. 455 U.S. at 493. The Court determined that the challenged ordinance was not overbroad since it was aimed primarily at commercial speech and the government has the authority to ban commercial speech promoting an illegal activity. *Id*. at 504-05.

See also Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (holding that a statute may be invalidated on its face only if the overbreadth is substantial).

89. 958 F.2d at 1265-66.

90. *Id*.

nine violated his Fourteenth Amendment rights to equal protection and due process.[91] The court stated that the library rules were not arbitrary and were not enacted with a discriminatory intent.[92] In addition, since the homeless are not a suspect class,[93] the *Kreimer* court observed that the rules need only survive the lowest standard of review for equal protection purposes, a standard clearly exceeded by the court's forum analysis.[94]

III. CRITICAL ANALYSIS

A. Standard of Review

An appellate court's review of an order granting summary judgment is plenary.[95] In this case, the United States Court of Appeals for the Third Circuit correctly determined that it should apply the same test for summary judgments as the district court applied in its original summary judgment analysis.[96] While the parties' factual statements varied, the court realized that no genuine issue of mate-

---

91. *Id*. The Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

92. 958 F.2d at 1269.

93. *Id*. at 1269 n.36. The U.S. Supreme Court has concluded that poverty does not create a suspect classification. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

The District Court for the Southern District of Florida recently suggested that homelessness may have some of the characteristics of a suspect class. However, the court determined that resolution of that issue was beyond the scope of its pending case. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992).

94. 958 F.2d at 1269 n.36. The traditional test for equal protection claims is the rational basis test. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

95. *See supra* note 33.

96. Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242, 1250 (3d Cir. 1992). *See* Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). The *Goodman* court stated that in reviewing an order for summary judgment, the appellate court should:

> Apply the same test the district court should have utilized initially. Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt.

534 F.2d at 573.

rial fact existed in this case.[97] However, by ordering the district court to reverse its summary judgment order for the appellee in favor of summary judgment for the appellants, the court misapplied the applicable law in relation to segments of the questioned rules. The following discussion provides a framework for revising the rules under current Supreme Court precedent.

B. Time, Place and Manner Restrictions

The United States Court of Appeals for the Third Circuit correctly classified the library as a designated public forum.[98] While the district court categorized the library as both a designated public forum and a quintessential traditional public forum,[99] the designated public forum classification is more appropriate. Traditional public forums encompass much more than a First Amendment right to receive the written word. They include the right to assemble and debate public questions.[100] A library, by its nature, does not encourage a patron, for example, to mount a soapbox to orate on a particular topic, something that might occur and would be appropriate in a traditional public forum. Instead, a library creates a more controlled environment for First Amendment activity. Therefore, the Morristown Library is appropriately classified as a designated public forum which is property that the state has opened for use by the

---

97. 958 F.2d at 1250. While the Morristown Library and Kreimer differ on the specific nature of his conduct and the conduct of others, the dispute pending before the court was not whether or not Kreimer actually engaged in the prohibited conduct. Rather, the dispute involved a matter of law — the constitutionality of the rules enacted by the library. For examples of differences in facts, compare Brief on Behalf of Defendants The Joint Free Public Library of Morristown and Morris Township at 3-8, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501) and Reply Brief on Behalf of Defendants, The Joint Free Public Library of Morristown and Morris Township at 1-8, *Kreimer* (No. 91-5501), with Brief on Behalf of Plaintiff/Appellee Richard R. Kreimer at 3-7, *Kreimer* (No. 91-5501).

98. *See supra* notes 52-62 and accompanying text.

99. Kreimer v. Bureau of Police for Morristown, 765 F. Supp. 181, 187 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992).

100. *See* Hague v. Committee for Indus. Orgs., 307 U.S. 496 (1939). In *Hague*, the Court recognized the importance of streets and public parks to citizens exercising their rights and liberties. *Id*. at 515. The Court voided an ordinance which forbade public assembly in streets or parks in Jersey City, New Jersey without a permit from the Director of Safety. *Id*. at 518. Under the ordinance, the Director could refuse a permit to prevent riots or other disturbances. *Id*. at 516.

public as a place for expressive activity.[101]

Clearly, a public library fits this definition. A library is public property, funded by government, and opened to serve the citizens of the community. It gives them a place to receive ideas and information.[102] On occasion, the library also opens its doors for meetings which allow patrons to share ideas verbally.[103] It may also host charity events for community groups. These uses of the library by the public for a variety of expressive activities precludes the library from slipping into the non-public forum category. Therefore, as a designated public forum, any rules created by the library must meet a strict standard of review.[104]

In reversing the district court's finding that the library rules were unconstitutional, the Third Circuit first classified the library as a limited public forum.[105] The court then applied two different tests to determine the constitutionality of the rules. Paragraphs one and five, which dealt with conduct rather than a patron's exercise of his First Amendment rights, were judged merely by their reasonableness.[106] Paragraph nine, which might lead to expulsion of a library patron based on poor bodily hygiene, was judged by a stricter standard.[107] In applying these separate tests, the court explained that the Supreme Court has stated that restrictions on First

---

101. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In determining whether a designated public forum has been created, it is necessary to consider the intent of the government in opening the forum. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 803 (1985). For example, in *Cornelius*, the NAACP Legal Defense Fund wanted to be included in a group of organizations made available to federal employees for payroll contributions under the Combined Federal Campaign. *Id*. at 793. The Court, however, concluded that the Campaign was a non-public forum, stating that "[w]e will not find that a public forum has been created in the face of clear evidence of a contrary intent . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Id*. at 803.

102. Receiving information is an activity covered by the First Amendment. *See supra* notes 37-46 and accompanying text.

103. *See*, *e.g.*, Concerned Women for Am. v. Lafayette County, 883 F.2d 32 (5th Cir. 1989) (holding that a public library which allowed groups to use its auditorium could not prevent a prayer group from using its rooms for a meeting).

104. *See supra* note 50.

105. *See supra* notes 52-62 and accompanying text.

106. *See supra* notes 65-67 and accompanying text.

107. 958 F.2d at 1264. This stricter standard requires a showing that the rule is narrowly tailored to serve a significant governmental interest. *Id*. The rule must also allow ample alternative means of communication. *Id*. *See also supra* text accompanying notes 69-76.

Amendment activities, not specifically permitted in the designated public forum, need only be reasonable.[108]

The court relied on *United States v. Kokinda*[109] in applying two separate tests. However, *Kokinda* is distinguishable because there the Court determined that the post office sidewalk was generally a non-public forum, except for the specific use of bulletin boards in front of the office.[110] In *Kreimer*, the library itself is a designated public forum.[111] It is open for the larger First Amendment purpose of sharing information and is not restricted to one specific exercise of First Amendment rights. In addition, by citing *Kokinda* as its authority for applying a reasonableness test to paragraphs one and five, the *Kreimer* court traveled down the path against which Justice Brennan warned in his dissent in *Kokinda*.[112] As Justice Brennan suggested, any government institution can limit First Amendment speech under *Kokinda* by specifically prohibiting the activity in its definition of use and assuring that the limitation is reasonable.[113] If courts continue to follow this reasoning in defining public forums, the ability to engage in a wide range of First Amendment rights, which have evolved over the years, will gradually be diminished.

The *Kreimer* court's reliance on *Kokinda* as authority for applying the reasonableness test to paragraphs one and five is also inconsistent. In its opinion, the *Kreimer* court cautioned that the importance of the *Kokinda* opinion was unclear since only four Justices believed the post office sidewalk was a non-public forum.[114] In fact, in *Kokinda*, Justice Kennedy stated that even if the sidewalk was a designated public forum, the regulations met the narrowly tailored standard of review.[115] Yet, despite these stated misgivings, the *Kreimer* court relied on *Kokinda* in formulating its analysis.

The *Kreimer* court also relied on *Travis v. Owego-Apalachin School District* to conclude that the library may limit expressive

---

108. 958 F.2d at 1262 (noting United States v. Kokinda, 497 U.S. 720, 730 (1990)).

109. 497 U.S. 720 (1990) (plurality opinion).

110. *Id*. at 730.

111. *See supra* notes 52-62 and accompanying text.

112. 497 U.S. at 750-51 (Brennan, J., dissenting). Justice Brennan believed that the plurality "collapsed the distinction between exclusions that help define the contours of the forum and those that are imposed *after* the forum is defined." *Id*. at 750. *See also supra* note 66 and accompanying text.

113. 497 U.S. at 750-51.

114. 958 F.2d at 1259 n.13.

115. 497 U.S. at 737-39 (Kennedy, J., concurring).

activity to certain types of subjects.[116] However, the *Travis* court specifically noted that "in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre."[117] The *Kreimer* court noted that the Morristown Library operated for many years without these limits.[118] During that time, other activities, such as quiet contemplation, undoubtedly were permitted. Following the *Travis* court's reasoning, the library cannot now take away some of the First Amendment freedoms previously allowed.

Finally, instead of applying the reasonableness test, the *Kreimer* court should have recognized that these rules are restrictions on the manner in which patrons exercise their First Amendment rights to receive information in a designated public forum, such as the Morristown Library. The rules, instead, should be examined to determine if they are narrowly tailored to serve a significant government interest while providing ample alternative channels of communication.[119]

C. Are the Rules Narrowly Tailored?

The library's stated purpose for creating the rules was to assure that all patrons of the library may use its facilities to the maximum extent possible and to "foster[] a quiet and orderly atmosphere in the library."[120] There is no question that the purpose is valid. In *Brown v. Louisiana*,[121] the Supreme Court described libraries as "place[s] dedicated to quiet, to knowledge, and to beauty."[122] The

---

116. 958 F.2d at 1261 (following *Travis*, 927 F.2d 688 (2d Cir. 1991)).

117. 927 F.2d at 692.

118. 958 F.2d at 1246. The Board of Trustees of the Morristown Library did not promulgate any written rules until May 1989. Prior to that time, the staff followed a set of unwritten rules and procedures to regulate conduct. *Id*.

119. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); United States v. Albertini, 472 U.S. 675, 689 (1985) (holding that the narrowly tailored requirement is met "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (stating that time, place, and manner restrictions will not be invalidated if they are sufficiently and narrowly written to serve a substantial enough government interest).

120. Kreimer v. Bureau of Police for Morristown, 765 F. Supp. 181, 187 (D.N.J. 1991).

121. 383 U.S. 131 (1966).

122. *Id*. at 142.

Court in *Brown* reversed the convictions of five black men who were arrested after standing silently in a Louisiana public library to protest against the library's segregation policy.[123] Acknowledging that a library may regulate the use of its facility, the Court warned, however, that it "may not invoke regulations as to use . . . as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."[124]

Paragraph one of the Morristown Library policy requires patrons to engage in reading, studying, or using the library materials.[125] While the rule may meet a reasonableness analysis as applied by the court, the application of the narrowly tailored standard, as discussed in *Ward v. Rock Against Racism*,[126] raises concerns. *Ward* required that the means chosen to advance the government's interest in creating the forum must not be substantially broader than necessary.[127] At first glance, paragraph one would appear to promote the library's interest in creating a quiet and orderly environment. However, by limiting patrons to only three appropriate uses for the library, rule one burdens more speech than necessary to further the library's interest. The rule prohibits someone from sitting quietly in the library, perhaps while organizing thoughts and ideas before deciding on a course of research, or from balancing a checkbook, an activity that library counsel conceded during oral argument would be appropriate in a library.[128] In addition, under paragraph one, the silent library protest deemed constitutional in *Brown*[129] would not be allowed at the Morristown Library. Under paragraph one, the Inter-

---

123. *Id*. at 143.

124. *Id*.

125. *See supra* text accompanying note 23. New Jersey Public Advocate Wilfredo Caraballo, in an amicus brief, also suggests that balancing a checkbook would run afoul of the library rules. In his brief, Mr. Caraballo suggests that defendant's counsel:

> [M]ay have mentally prefaced that answer on two assumptions: (1) the astute checkbook balancer, wary of expulsion, would be sure to have a library book open beneath the bank statement, and (2) a patron with sufficient resources even to *have* a checking account is not a likely target to trigger a third person's complaint that the checkbook balancer is not engaged in traditional library activities.

Brief of the Public Advocate of New Jersey as Amicus Curiae at 20, *Kreimer* (No. 91-5501).

126. 491 U.S. 781 (1989). *See also supra* note 72.

127. 491 U.S. at 800.

128. *Kreimer*, 765 F. Supp. at 193. *See supra* note 125.

129. Brown v. Louisiana, 383 U.S. 131 (1966). *See supra* text accompanying notes 121-24.

nal Revenue Service would not be able to set up its tax assistance centers and scout troops would not be allowed to hold fundraising bake sales. Clearly, paragraph one, as currently written, does not meet the necessary standard for review and should be rejected.

However, if the library expanded its allowable activities to include quiet contemplation[130] and activities which assist the community (such as fundraising events and educational assistance), paragraph one would pass the standard of review. The addition of "quiet contemplation" would allow patrons to sit in solitude with their thoughts for any length of time, without worrying about a librarian ousting them from the building unless they use library materials. Apparently, the library was concerned about someone sitting, not for half an hour or so, but for hours in quiet contemplation.[131] However, the current policy would not prohibit that conduct as long as someone periodically chooses a book for review and has the book handy in case a librarian questions their activity.[132] The addition of quiet contemplation as an appropriate use for the library recognizes it as a "place dedicated to quiet, to knowledge, and to beauty."[133] In addition, allowing its use for community activities would recognize the importance of the library in the community and assure no conflicts in the future as to whether these events fit within paragraph one. The addition of specific activities for use of the library runs the risk of defining the forum through a laundry list of allowable activities. However, by encompassing activities which had been allowed prior to the enactment of the policy, the paragraph will assure that the library is used to the maximum extent possible

---

130. Library counsel agreed that quiet contemplation is a library related activity under the current rules as long as library materials are used a short time prior to the contemplation. 765 F. Supp. at 193.

131. Library counsel specifically stated during oral argument that the library was not a place for someone to sit for hours without reading or studying. *Kreimer*, 958 F.2d at 1267.

132. The New Jersey Library Association filed an amicus brief in this case. The Association complained that the trial court's conclusion that the library policy must be aimed at actual or imminent disruptive behavior would permit too many activities which are incompatible uses for a library. As examples, the Association cited exercise, sleep, knitting, and operating a business. Brief on Behalf of Amicus Curiae New Jersey Library Association at 26, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501).

133. Brown v. Louisiana, 383 U.S. 131, 142 (1966). *See also supra* text accompanying notes 121-24.

as suggested in its mission statement.[134]

Paragraph five, on the other hand, specifically defines inappropriate conduct for a library, stating that patrons shall not "harass or annoy others . . . by staring at another with the intent to annoy that person, [or] by following another about the building with intent to annoy that person."[135] The district court invalidated segments of this paragraph (and paragraph nine)[136] because the prohibited activity did not "actually and materially interfere[] with the peaceful and orderly management of the public space."[137] The Third Circuit Court of Appeals rejected this argument,[138] finding paragraph five appropriate under its reasonableness test.[139] Patrons who find someone staring at them or following them around may disagree with the district court that such conduct does not directly interfere with the management of the space. The district court erred in rejecting those portions of rule five which prohibit that conduct. In fact, applying the narrowly-tailored standard of review, the rule fosters the library's interest in creating a quiet and orderly environment. While the library perhaps could have adopted a less restrictive alternative, the rule meets the standard outlined in *Ward*, although it raises some vagueness concerns.[140]

Finally, perhaps the most troubling aspect of the policy is paragraph nine which requires "[p]atrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons" to leave the building.[141] The court properly scrutinized the rule using the nar

---

134. *See supra* note 1 and accompanying text.

135. *See supra* note 23 and accompanying text.

136. The district court retained that portion of paragraph five proscribing playing Walkmans or other audio equipment, talking or singing to oneself, and that portion of paragraph nine requiring shirts and shoes in the library. 958 F.2d at 1250 n.8 (citing Kreimer v. Bureau of Morristown Police, 765 F. Supp. 181 (D.N.J. 1991)).

137. 765 F. Supp. at 188-89. The court cited both Heffron v. ISKCON, Inc., 452 U.S. 640 (1981) (finding that restrictions within a public forum should be assessed based on the characteristic, nature, and function of the forum), and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that a school cannot ban wearing of black armbands unless expression materially and substantially interferes with school activities).

138. 958 F.2d at 1263 n.25. The court discussed several activities within the library's regulation which are not disruptive, including limits on book withdrawals and requiring shoes. *Id*.

139. *Id*. n.24.

140. *See supra* notes 77-86 and accompanying text. For instance, the phrase "annoying behavior" may mean different things to different people.

141. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON

rowly-tailored test and found it to be sufficiently narrow.[142] The court believed the rule properly prevented one patron's poor bodily hygiene from interfering with other patrons while maintaining the sanitary environment of the library.[143] However, by finding that the paragraph is narrowly-tailored to serve a significant government interest, the court ignored that part of the test which requires that the means not be substantially broader than necessary to achieve the government's purpose.[144] There are less drastic means to achieve the library's stated purpose of a quiet and orderly atmosphere. For example, as suggested in the plaintiff's appellate brief,[145] the library could install air fresheners, patrons could move away from those whose odor they deem offensive,[146] or a separate area could be set aside for those with hygiene problems.[147]

In addition, the court dismissed the requirement that adequate alternative means of communication be made available by stating that a patron need only comply with the rules to use the library facilities.[148] However, there are no adequate alternative means for a homeless person without daily access to shower and laundry facilities or freshly washed clothes. He or she might never be able to meet the standard regarding bodily hygiene. A policy which allows the homeless to use the library only after they shower or freshen up in order to avoid offending other patrons fails to recognize the realities of life for the homeless population. At the very least, the library could initiate an outreach program providing reading materials to the homeless as an alternative means of communication. Library staff could select materials which would notify the homeless about benefits to which they may be entitled. They could inform homeless persons about how to apply for these programs and could also pro-

---

POLICY ¶ 9 (July 1989).

142. 958 F.2d at 1264.

143. *Id*.

144. *See* Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989).

145. Brief on Behalf of Plaintiff/Appellee Richard R. Kreimer at 21, Kreimer v. Bureau of Police for Morristown, 958 F.2d 1242 (3d Cir. 1992) (No. 91-5501).

146. Undoubtedly, many of us have moved away at some time from those whose strong perfumes or tobacco odors have bothered us.

147. Brief on Behalf of Plaintiff/Appellee Richard R. Kreimer at 21-22, *Kreimer* (No. 91-5501). Appellee Kreimer states that he would not advocate a separate area, but would find it preferable to total exclusion. *Id*. at 22 n.6.

148. 958 F.2d at 1264.

vide listings of local services for the homeless.[149] Perhaps the library could utilize a bookmobile to visit locations where the homeless gather to safeguard their access to this information. Preventing access to a public library simply because of offensive bodily hygiene is too extreme and the section of the rule applicable to offensive bodily hygiene should be eliminated.

D. Void for Vagueness

The *Kreimer* court found that paragraphs one, five, and nine of the patron policy were not unconstitutionally vague.[150] Paragraph one, which requires patrons to read, study, or use library materials, specifically lists appropriate activities.[151] While library staff members retain some discretion in determining whether patrons are actually engaged in these activities, an amendment to the rules to include other activities such as quiet contemplation, and events to benefit the community, would provide the staff with additional guidance on appropriate behavior. In addition, a written library policy requiring staff to give potential violators a warning about rules violations prior to asking them to leave should prevent arbitrary applications of the rules.[152]

Paragraph five requires patrons not to harass or annoy others through specific noisy activities, but also by "staring at another with the intent to annoy that person, [or] by following another person about the building with the intent to annoy that person."[153] Paragraph five's emphasis on annoying behavior raises questions under the vagueness doctrine. Similar language preventing three or more persons from assembling on sidewalks or street corners "in a manner annoying to persons passing by" was struck down by the United States Supreme Court in *Coates v. City of Cincinnati*[154] as being too

149. This alternative does not provide the homeless with access to the full range of materials available within the library. However, it would be preferable to total exclusion based on the inaccessibility of shower facilities.

150. 958 F.2d at 1266-68.

151. *See supra* text accompanying note 23.

152. Library counsel indicated that personnel first approach patrons who are violating the rules asking them to comply with the rules before requiring them to leave the library. 958 F.2d at 1267. A written policy would assure a consistent application of this practice.

153. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 5 (July 1989). *See also supra* text accompanying note 23.

154. 402 U.S. 611 (1971).

vague.

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."[155]

The library apparently specified the conduct involving staring at and following others in response to patron complaints prior to the enactment of the rules.

However, rather than prohibiting the conduct by describing it as annoying to others, the library could rewrite rule five as follows:

> Patrons shall respect the rights of other persons, shall not engage in noisy and boisterous activities, shall not intentionally stare or follow others around the library, shall not play Walkmans or other audio equipment so that others can hear it, shall not sing or talk to oneself, and shall not engage in any other behavior which may reasonably result in the disturbance of other persons.[156]

If the proposed rule were enacted with a written policy requiring staff to warn a patron that his conduct is in violation of the rules, the patron would have the opportunity to comply before being asked to leave. Thus, if a patron or employee was distracted or annoyed by someone staring at them, the staff could discuss the concern with the offender, explain the problem, and work out a reasonable solution allowing everyone to continue using the library. The solution may be as simple as having one of the parties move away from the other. There is no doubt that being stared at can be unnerving, but it is also not difficult to imagine a situation in which a patron is inadvertently staring at another while collecting one's thoughts. Providing prior notice or warning and allowing an offender an opportunity to comply with rules before asking that person to leave is preferable to another's arbitrary decision that the conduct is annoy-

---

155. *Id*. at 614 (quoting, in part, Connally v. General Constr. Co., 269 U.S. 385 (1926)).

156. This proposal is modeled after the current version of paragraph five with additional language included by this author to address vagueness concerns. *See supra* text accompanying note 23.

ing and warrants removal of the perpetrator. Otherwise, someone using the library as required by paragraph one could be asked to leave, for example, while contemplating a chapter he or she had just read.

Similarly, the phrase "other behavior which may reasonably result in the disturbance of other persons"[157] in paragraph five may be questioned as vague. In addressing this phrase, the *Kreimer* court correctly interpreted the word reasonably to mean an objective standard.[158] While the rule gives the library staff some discretion, it is preferable, in this instance, to the alternative of preparing a laundry list detailing activities which would be disturbing to others. The rule highlights the most common disturbing behaviors in a library (i.e., talking, singing and playing Walkmans), and properly puts patrons on notice that disturbances are inappropriate. If the staff is instructed to discuss the behavior with a patron before removal, a solution may be reached which would prevent arbitrary decisions requiring patrons to leave the library.

Paragraph nine, which states patrons "whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building," should be stricken.[159] There is no objective test for odors as there is for sound. Perfumes that are appealing to one person may be disturbing to another. Further, as the district court expressed so aptly in *Kreimer*:

> [O]ne person's hay-fever is another person's ambrosia; jeans with holes represent inappropriate dress to some and high fashion to others. Thus, no matter how laudable and understandable the goals of the library may be, we cannot — we dare not — cross the threshold of barring persons from entering because of how they appear based upon the unfettered discretion of another.[160]

The Third Circuit, however, found the language barring offensive hygiene which constitutes a nuisance[161] to be necessarily broad be-

---

157. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 5 (July 1989). *See supra* text accompanying note 23.

158. 958 F.2d at 1268 n.35.

159. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 9 (July 1989).

160. 765 F. Supp. at 183.

161. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, LIBRARY PATRON POLICY ¶ 9 (1989). *See supra* text accompanying note 23.

cause it would be impossible to list all the predicates of a nuisance. The court also cited New Jersey common law defining nuisance as including "anything that unduly interferes with the exercise of the common right."[162] Whether offensive odors "unduly interfere" with the exercise of a library patron's First Amendment rights is questionable. In addition, librarians can apply the rule only through their own subjective determination of what may interfere with another library user. Therefore, paragraph nine is too vague and allows the library staff too much discretion in determining whose hygiene is offensive.

Library staff would probably not ask a well-dressed man or woman to leave simply because they used too much cologne, yet many people might find such a strong scent a nuisance.[163] Instead, offended patrons could reasonably move away from the area. This is also a reasonable expectation if a patron finds another's bodily hygiene repugnant. The very use of the word "nuisance" in paragraph nine is in itself vague, often defying definition among legal scholars. A leading treatise on tort law states:

> There is perhaps no more impenetrable jungle in the entire law than that which surround the word "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.[164]

---

162. 958 F.2d at 1268 (quoting Mayor of Alpine v. Brewster, 80 A.2d 297 (N.J. 1951)).

163. Attorney Bruce Ennis, who represents the Freedom To Read Foundation, has cautioned librarians not to completely adopt the Morristown Library's rule regarding hygiene. Ennis discussed instances where the rule would not directly apply, "such as a patron complaining about another's overwhelming perfume." Gordon Flagg et al., *Not the Big One II: 1992 ALA Conference*, 23 AM. LIBR. 628, 631 (1992).

164. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616 (5th ed. 1984). In addition, two courts have adopted somewhat differing views regarding issues affecting the homeless and claims that certain behaviors constitute nuisances. A New York State Supreme Court rejected a neighborhood association's argument that the use of a hotel to house homeless families created a public nuisance. Spring-Gar Community Civic Ass'n v. Homes for the Homeless, Inc., 516 N.Y.S.2d 399 (Sup. Ct. 1987). Acknowledging that the facility in question had not yet opened, the court refused to find that the maintenance and operation of the residential facility would constitute a nuisance per se. *Id*. at 402. Instead, the court required a showing that the facility substantially interfered with the common rights of the public. *Id*.

Compare Armory Park Neighborhood Ass'n v. Episcopal Community Servs., 712

Because of the lack of a definition for offensive odors, as well as the term "nuisance," the library should strike that portion of paragraph nine which requires those with offensive bodily hygiene to leave the library. Instead, the library should consider other alternatives, such as installing an air freshening system, suggesting to complaining patrons that they move away from those whose odor they find offensive, or visiting areas where the homeless congregate with a bookmobile carrying materials and books to assist them in overcoming their poverty.

E. Overbreadth

In challenging the library rules, Kreimer complained that rule one reaches constitutionally protected conduct, like the silent protest initiated in *Brown*.[165] The *Kreimer* court disagreed, refusing to sanction the overbreadth challenge based on a hypothetical situation.[166] However, as currently written, the policy would prevent the protest deemed constitutional in *Brown*.[167] Because it chills First Amendment expression by prohibiting activities like a silent protest, the policy is overbroad and should be rewritten to address concerns that it reaches more conduct than necessary. In fact, if the library would amend its rules, the overbreadth doctrine would not be an issue because the rules would no longer affect a substantial amount of constitutionally protected expression.

P.2d 914 (Ariz. 1985). Here, the court was faced with a challenge to a local soup kitchen which neighbors alleged was a nuisance. *Id*. at 915. The court upheld a preliminary injunction preventing further food distribution based on the neighbors' complaints. *Id*. at 923. The court held that the conduct of those visiting the kitchen "unreasonably and significantly interfere[d] with the public health, safety, peace, comfort or convenience," thus created a public nuisance. *Id*. at 923. The application of the Arizona court's definition of nuisance to the *Kreimer* case would still raise questions about the conduct of the Morristown Library. One person's poor hygiene would not likely "unreasonably and significantly" interfere with the entire use of the library.

165. 958 F.2d at 1266 n.30 (discussing Brown v. Louisiana, 383 U.S. 131 (1966)). *See supra* notes 121-24 and accompanying text.

166. 958 F.2d at 1266 n.30.

167. *See supra* text accompanying notes 121-24.

IV. CONCLUSION

Unquestionably, libraries have the right to make rules to preserve the sanctity of their space. They should formulate rules which promote the efficient use of the library for their patrons. However, they must not use those rules to discriminate against or to pursue those engaged in the exercise of constitutionally-protected rights. Yet, the Morristown Library has done just that. The library policy discriminates against homeless citizens since they are the ones most likely to be unable to meet the arbitrary standard set for offensive bodily hygiene. In addition, the library policy hampers efforts by the homeless to learn about new programs which will aid them in escaping their poverty.

Despite the approval of its rules by the Court of Appeals for the Third Circuit, the Joint Free Public Library of Morristown and Morris Township can revise its policy to reach out to the whole community of Morristown by implementing the suggestions made in this Note. An outreach program for the homeless, through bookmobiles or shelter visits, would be a step in the right direction. The library specifically states that providing materials for information and self-improvement is one of its missions.[168] Yet, the library's exclusion of some of Morristown's homeless residents demonstrates that it is failing in its mission. As United States District Court Judge H. Lee Sarokin wrote in rejecting the library policy, "[i]f we wish to shield our eyes and noses from the homeless, we should revoke their condition, not their library cards."[169]

Kim R. Helper

---

168. JOINT FREE PUB. LIBR. OF MORRISTOWN & MORRIS TOWNSHIP, MISSION STATEMENT (1992).

169. 765 F. Supp. 181, 183 (D.N.J. 1991).